

# "A Supervisory Agency of Its Own Making"?

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In December 2019, the recently constituted European Parliament (EP) will elect the European Ombudsman (EO). The current EO, Emily O'Reilly, already announced that she will seek a new mandate when her term expires. Her performance during the last five years, however, raises serious questions about her understanding of the mandate.

The annual reports of EOs are not exactly what one would call exciting reading, but usually they are serious and solid reports on complaint-based cases and activities and stay strictly within the limits of the EO's competencies.

This, however, changed considerably when Emily O'Reilly took office in 2013. Very soon she announced to get engaged, besides her treaty-based functions, in "proactive strategic initiatives" and a "more political approach", without opening inquiries, but with the aim to give recommendations to the Union's organs and institutions. In an [interview](#) in January 2015, she said: "*I decided to concentrate some of my resources on strategic investigations into systemic problems in the EU administration*" (emphasis added). This is repeated on her [website](#): "Beyond inquiries into specific complaints about maladministration in the EU institutions, the EO also has the power to proactively work on broader strategic issues. The EO carries out strategic investigations on her own initiative, which aim to draw attention to matters of public interest and look into wider systemic issues affecting the EU institutions and the democratic decision-making process." The toxic term here is "strategic", meaning "primarily political". It is worth mentioning that a number of experienced lawyers in the EO's office were replaced by non-lawyers under that new strategy.

One has to recall that all competencies of the European Union's organs, institutions or agencies are based and depend upon conferral (Art. 4 and 5 TEU). None of them can invent or grant themselves competencies not conferred. And one searches in vain for a competence of the EO to engage in "strategic investigations into systemic problems in the EU administration", in primary as well as in secondary EU Law.

Art. 228(1) TFEU is very clear in this respect:

"A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role "(...)  
"In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of

complaints submitted to him direct or through a Member of the European Parliament (...)."

To "conduct inquiries on his own initiative" is not an additional power, but one "in accordance with his duties"; the duties are clearly described in the beginning of Art. 228(1) TFEU. The "own initiative" does not confer a competence to conduct strategic investigations into wider systemic issues.

Likewise, there is not one word on "proactive strategic initiatives" or "investigations into wider systemic issues" in the "[Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties](#)". Apart from that, the European Parliament would not be in the position to extend the competencies of the EO beyond those conferred in the Treaties.

## **Some examples of "proactive strategic initiatives"**

In 2016, the EO opened a strategic initiative aimed at the former President of the EU Commission, Manuel Barroso (until 31 October 2014), at that time a private person. The reason for this investigation was his appointment in July 2016 to a senior position in an international investment bank, which, however, happened after the expiry of the "cooling off period" provided in the Code of Conduct for Commissioners. Later on, the EO pursued the inquiry as directed against the EU Commission on the basis of three complaints (Cases [194/2017/EA](#), [334/2017/EA](#), [543/2017/EA](#)). In contrast to the (advisory) Ethics Committee, the EO found a case of maladministration and made recommendations, which were not taken up by the Commission.

In January 2017, the EO, upon a complaint from a NGO ([Case 1697/2016/ANA](#)), opened an inquiry against the membership of the President of the European Central Bank (ECB), Mario Draghi, in the "Group of Thirty" (G30), a private group that includes senior public officials, *inter alia* from Central Banks, academics and private sector bankers. The EO maintained that the ECB President's continued membership of the G30 could undermine public confidence in the independence of the ECB, and thus would constitute a case of maladministration. All five respective recommendations made by the EO were disregarded by the ECB.

On 1 October 2018, the EO opened an inquiry against the European Parliament (EP) upon a complaint by a journalist (cf. Peter Teffer, "[EU parliament rejects ombudsman over expenses](#)"). The background of the case ([1651/2018/THH](#)) is that the Bureau of the EP had set up a Working Group in order to make proposals for the revision of the General Expenditure Allowance, a "flat rate allowance" which MEPs receive every month to cover costs directly related to their mandate. The Bureau took a decision on the proposals, which was published. The complainant, however, requested to also see the preparatory documents, which the EP denied, but the EO, on 29 April 2019, recommended. A letter to the EO by the outgoing President of the (now former) EP of 1 July 2019 concludes by saying: „The Parliament respectfully disagrees with the EO's approach, both procedurally and in substance".

On 15 July 2019, the EO launched an inquiry against the Council of the European Union upon a complaint by Foodwatch International (Case [1069/2019/MIG](#)), criticizing that the Romanian Presidency (between January and June 2019) was sponsored by Coca Cola. The Council has replied to the complainant that “[t]he organization of the Presidency, including the seeking of sponsorship for elements of a Presidency, is, in principle, a matter for the member state authorities concerned, in this case Romania. It is not a matter falling within the power of decision of the Council”. The EO maintains that the Council, under its Rules of Procedure (Chapter I.4) may well give some guidelines on how Presidencies of the Council are organized, and asked the Council to reply by 13 September 2019. The outcome was foreseeable. The Finnish government (current Presidency) [announced](#) that Finland had no plans to discuss the issue with other countries and that it had decided to make an agreement with only one sponsor (BMW) during its presidency. It later [clarified](#) that the decision was taken after an EU-wide call for tenders and that BMW does not provide fuel or drivers.

All these activities of the EO are certainly “strategic work”, in the sense that they are political. But they do not necessarily fall within the mandate of the EO. One might also wonder whether this left enough time and resources to properly deal with the actual tasks of the EO.

## **Jeopardizing independence – The Selmayr case**

Moreover, even the unquestionable competencies of the EO have some limits, which the EO seems to have overlooked in her political activism in the notorious “Selmayr case”.

On 21 February 2018, the European Commission announced that Mr. Martin Selmayr, previously Head of President Juncker’s Cabinet, would be appointed Secretary-General of the Commission. As a consequence, the European Parliament carried out an examination of the procedure applied for this appointment and adopted a resolution on 18 April 2018, stating that the “two-step nomination of the Secretary-General could be viewed as a coup-like action which stretched and possibly overstretched the limits of the law”, but refrained from requesting Selmayr’s resignation.

On 5 May 2018, the EO wrote a letter to the President of the Commission, stating that she had received two complaints from *delegations* of the European Parliament (Dutch D’66 delegation – ALDE Group, case [488/2018/KR](#), and the French Socialists and Democrats’ delegation – S&D Group, case [514/2018/KR](#)), alleging that the appointment of the new Secretary-General of the Commission did not comply with the EU Staff Regulations and with principles of good administration, and that she had opened a joint inquiry into these complaints.

This inquiry was based on questions and answers already dealt with by the Parliament and some additional ones. It resulted in the identification of four instances of maladministration and the recommendation that the Commission put in place a specific procedure for appointing a Secretary-General (31 August 2018), as well

as in a “Decision in the joint inquiry in cases [488/2018/KR](#) and [514/2018/KR](#)” of 11 February 2019. In this Decision, the EO no longer speaks about “delegations of the European Parliament”, but about “a number of complaints...several of which were submitted by Members of the European Parliament (MEPs)”. None of those alleged numerous complaints is identified in the Decision, and none got an additional case number in that “joint inquiry”, besides those for the “delegations”.

Why that change in the name of the (now unnamed) complainants? Had someone reminded the EO that accepting complaints from Parliament delegations was not such a bright idea? The two delegations that filed complaints were apparently those who had unsuccessfully requested that Selmayr should resign. It seems like they tried to repair their defeat with the help of the EO.

Art. 228 TFEU is very clear in that respect: The EO is empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State. *Delegations* of the Parliament are none of those. And also members of a delegation cannot simply change hats and appear before the EO as citizens in a matter where they are not the personal victim of a maladministration, but want to correct a political decision. And complaints submitted through a member of the Parliament are complaints of citizens, not of the MEP themselves.

To make a possibly long legal story short: The complaints of the two delegations (and those are the only ones the decision of the EO of 11 February 2019 is based upon) were inadmissible, and admitting them was an *ultra vires* act.

According to Art. 228 TFEU, “the EO shall be completely independent in the performance of his duties (...) he shall neither seek nor take instructions from any Government, institution, body, office or entity” (Art. 228 sec. 3 TFEU). Nevertheless, the EO is closely linked to the Parliament; he or she is elected by the Parliament and shall submit to it annual reports on the outcome of the enquiries undertaken. An EO which sides *contra legem* with delegations of the Parliament, providing them with procedural possibilities they otherwise do not have, could easily be seen as biased.

In this respect it is at least unfortunate that the Parliament in its former composition chose to use its “Resolution of 13 December 2018 on the annual report on the activities of the European Ombudsman in 2017” to pick up activities from 2018 and to emphasize that Mr. Selmayr must resign as Secretary-General. Equally unfortunate is the fact that the Parliament, throughout the entire resolution, praises the EO’s political agenda and strategic initiatives, regardless of legal limits and the damage political activism might do to the EO’s reputation and authority in the eyes of the citizens. The EO is not a judge, but citizens expect the same independence and impartiality that qualifies a judge from their EO. How can a EO who disregards the legal limits of her own competencies, blame other EU institutions for “maladministration”? [Some have seen it coming](#).

As Herwig C.H. Hofmann [wrote](#), in case of “a systematic use own own-initiative investigations [...] the EO would face a significant risk of being politically motivated and acting indiscriminately, based on his or her own political agenda” ... and

“of being pulled into existing inter-institutional conflicts, which would be highly detrimental to his or her independence (or just the perception of her independence) and, thus, his or her impartiality” ... “Temptation might be strong to act as a supervisory agency of its own making”. (pp. 26/27, 11).

The European Parliament should very seriously consider to elect and appoint a European Ombudsman who leads the office back to its roots as defined in Art. 228 TFEU which leaves enough work to do. Otherwise, the European citizens will lose confidence in this very valuable institution.

